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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FREDRICK AARON MERRITT, Defendant and Appellant.	B202939 (Los Angeles County Super. Ct. No. VA092517)

APPEAL from a judgment of the Superior Court of Los Angeles County. Yvonne T. Sanchez, Judge. Affirmed.

Jennifer Peabody, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

Fredrick Aaron Merritt, also known as Fredrick Merritt, appeals from a judgment entered upon his conviction of being a felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1))[1] upon a negotiated plea of no contest, after his motion to suppress evidence pursuant to section 1538.5 was denied. Defendant admitted having suffered a prior felony strike within the meaning of sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d), and a prior prison term within the meaning of section 667.5, subdivision (b). Pursuant to the plea agreement, the trial court sentenced defendant to an aggregate state prison term of three years and eight months. Defendant contends that the trial court erred in denying his motion to suppress evidence because the warrantless search of his home and seizure of a rifle and ammunition from his bedroom violated his Fourth and Fourteenth Amendment rights.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[2]

Facts

The Prosecution's Evidence

On November 21, 2005, Detective Steven Velasquez and his partner, Deputy Kim, responded to a man-with-a-gun call at a Mobil station, at Compton Avenue and Firestone Boulevard. Upon arrival, they spoke with the victim, Harry White (White), who reported that defendant pointed a rifle at him. White told Detective Velasquez that he knew where defendant lived and that defendant was presently at home. The detective requested assisting units.

Detective Velasquez, with White in the back of the patrol car, drove to defendant's residence. There, he saw a blue-green vehicle, which White identified as the car in which defendant was sitting when he pointed the gun and in which he fled.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Because defendant was convicted without a trial based upon his no contest plea, we present the facts adduced at the suppression hearing.

Detective Velasquez then saw defendant standing in the front yard of his residence near the front porch. White immediately identified defendant as the man who pointed the rifle at him. There were six law enforcement officers, including Detective Velasquez and Deputy Kim, at the scene. Defendant was detained for investigation at gunpoint, patted down and placed in the patrol car.

Having understood that the assault with a rifle had just occurred and that there were people inside the house, the deputies entered the residence requesting everyone inside to vacate in order to conduct a protective sweep for officer safety. Detective Velasquez went into several rooms. He did not draw his gun and did not recall if any other officer did so. He was unsure if defendant's sister, Antoinette Merritt (Antoinette), was inside the residence, but defendant's mother, Katherine Merritt (Katherine), and his niece, Chastity Walker (Chastity), were. An unidentified male was also inside, working on the house.

After the house was cleared, Detective Velasquez spoke with Katherine on the porch. She told him that she owned the house and that defendant was her son and lived in the back room. The detective explained why the officers were present and asked if defendant was on probation or parole. Katherine responded, "'Yeah. Something like that.'"[3] Detective Velasquez asked, "'Is it okay if we go in there and search for this weapon?'" Katherine responded, "'I don't have any guns. Go ahead and search.'"

Deputies then searched the residence and recovered an unconcealed rifle and ammunition. Detective Velasquez returned to the front porch and asked Katherine to sign a consent to search form, memorializing her consent. She became uncooperative and refused to sign. She said that she did not realize there was a rifle inside, claimed she had not consented to the search, and even refused to give her name.

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[3] After the search, Deputy Kim determined that defendant was not on parole or probation.

Only later did Detective Velasquez learn that the assault had actually occurred the previous night. He had assumed it had just occurred because of the information he received in the dispatch call.

The Defense's Evidence

Antoinette heard several deputies enter the house without knocking. They asked, "Was anybody on Parole?" She replied, "No." The officers asked, "Could you please come out[?]" Chastity, Katherine, Antoinette, and Angela Revels, went outside to the front porch. Chastity reported that none of the deputies spoke "mean" to anyone present.

Antoinette never heard Katherine give permission for the deputies to search, but Antoinette could not hear the conversation Katherine had with the detective on the porch. Chastity also did not hear Katherine give permission to search or hear the deputies ask her name. The first time Chastity knew that law enforcement officers had spoken with Katherine was after the officers had found the rifle.

According to Katherine, Detective Velasquez walked her to the patrol car and asked her to sign papers. She refused because she did not know what they "were all about." He told her that he could reenter and search the rest of the house, to which Katherine replied, "So?" She was not asked her name and denied giving permission to search the house.

Rebuttal

Detective Velasquez testified that after Katherine came outside, she never left the porch or went to the patrol car.

Charges

An information was filed charging defendant with assault with a machine gun or assault weapon (§ 245, subd. (a)(3)), possession of a firearm by a felon (§ 12021, subd. (a)(1)), and possession of an assault weapon (§ 12280, subd. (b)). The information specially alleged two prior felony strikes and six prior prison terms.

Suppression Motion

Pursuant to section 1538.5, defendant made a motion to suppress evidence of the rifle and ammunition confiscated at his residence. Defense counsel argued that they were illegally seized because there was no basis for the deputies to enter the house to conduct a protective sweep. They were not in danger, as defendant was detained outside, his car identified, and the deputies had no information that anyone was inside. They never received consent to search.

The prosecutor argued that the initial entry into the house was justified as a protective sweep for officer safety, and the subsequent search was premised on the owner's consent. They were two distinct entries.

The trial court, after evaluating the credibility of all the witnesses, denied the motion, stating, "I find the search was consensual. Motion to suppress is denied."

Plea

Thereafter, defendant accepted a negotiated plea agreement, pleading no contest to being a felon in possession of a firearm and receiving a sentence of three years and eight months in prison.

DISCUSSION

A. Contentions

Defendant's sole contention on appeal is that the trial court erred in denying his suppression motion. He argues that the initial entry into defendant's residence was unjustified as a protective sweep because "the officers had no 'articulable facts' or rational inferences drawn from those facts, that would warrant a reasonably prudent officer to entertain a 'reasonable suspicion' that the area to be swept harbor[ed] a person posing a danger to officer safety." He further argues that any consent was given in response to an unlawful show of authority and the initial unlawful entry and was therefore not voluntary.

B. Standard of Review

"In reviewing the denial of a motion to suppress evidence, we view the record in the light most favorable to the trial court's ruling and defer to its findings of

historical fact, whether express or implied, if they are supported by substantial evidence. We then decide for ourselves what legal principles are relevant, independently apply them to the historical facts and determine as a matter of law whether there has been an unreasonable search and/or seizure. [Citation.]" (*People v. Miranda* (1993) 17 Cal.App.4th 917, 922; see also *People v. Glaser* (1995) 11 Cal.4th 354, 362.)

C. Standing

The short answer to the Attorney General's claim that defendant lacks a privacy interest sufficient to give him standing to challenge the search of his residence is contained in our decision in *In re Rudy F.* (2004) 117 Cal.App.4th 1124, 1135. We stated there that "all family members who reside in a home have a reasonable expectation of privacy from government intrusion in all areas of the home, even if internal familial rules restrict their use or access to certain areas. That some parts of a home may be the predominant domain of a particular family member does not diminish the expectation of privacy of other family members from government intrusion anywhere in the home." (*Id*. at p. 1135.) We therefore conclude that defendant has standing and address the merits of his claim.

D. Warrantless Search

"'The exclusionary rule was adopted to effectuate the Fourth Amendment right of all citizens "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ."' [Citation.] '[T]he "prime purpose" of the [exclusionary] rule, if not the sole one, "is to deter future unlawful police conduct." [Citations.]'" (*People v. Sanders* (2003) 31 Cal.4th 318, 324.) "'[T]he "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."'" (*People v. Camacho* (2000) 23 Cal.4th 824, 831.)

It is undisputed that the search of defendant's residence was effectuated without a warrant. This establishes a prima facie case that the search was illegal, placing the burden on the prosecution to show proper justification. (*People v. Haven* (1963) 59 Cal.2d 713, 717.) The prosecution sought to justify the deputies' initial entry into

defendant's residence as a protective sweep for officer and public safety and the subsequent search, which uncovered the rifle and ammunition, as consensual.

E. Protective Sweep

One exception to the warrant requirement is a "'protective sweep,'" described in *Maryland v. Buie* (1990) 494 U.S. 325, 327 (*Buie*) as, "a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." A protective sweep does not justify a full search of the premises, "but [can] extend only to a cursory inspection of those spaces where a person may be found. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." (*Id.* at p. 335.) Officers do not need probable cause to conduct a protective sweep, as a reasonable suspicion is sufficient. (*Id.* at p. 334; *People v. Ormonde* (2006) 143 Cal.App.4th 282, 293.) The question here is whether, under the facts presented, a protective sweep in defendant's residence was justified. We find that the danger posed by the rifle's unknown location justified relocating the occupants of the residence and quickly checking the house for additional threat to officer safety.

Though *Buie* involved a protective sweep during an arrest made inside the house, nothing in that case or any others that we have reviewed suggests that such a sweep is not available to protect officers when an arrest is made just outside of a house, so long as sufficient articulable facts support the intrusion. *People v. Celis* (2004) 33 Cal.4th 667 (*Celis*), cited by defendant, does not limit the availability of a protective sweep to in-home arrests. Rather, our Supreme Court, while declining to address the issue in that case, noted that other jurisdictions have found that an arrest outside of a house could pose an equally serious threat to the safety of the officers involved as one inside a house. (*Id.* at p. 679.)

Here, Detective Velasquez testified, "Because of the rifle that was used and described in this case we had . . . and that there were other people inside the residence, we had them exit the residence for our safety so we could conduct a protective sweep." It is important to note that throughout the time deputies were at the residence they

were under the mistaken belief that the reported assault had just taken place. We find that these facts are sufficient to raise a reasonable suspicion of danger, thus authorizing a quick, cursory sweep of the residence.

F. Consent

Defendant argues that Katherine's consent to the search which yielded the rifle was not voluntary, as it was in response to "an unlawful show of authority" and by the initial unlawful entry. We disagree.

Consent is a recognized exception to the Fourth Amendment proscription against warrantless searches. (*People v. Leib* (1976) 16 Cal.3d 869, 873; *People v. Superior Court* (2006) 143 Cal.App.4th 1183, 1198.) Where the prosecutor relies on consent to search, the prosecutor has the burden of establishing that the consent was freely and voluntarily given, was not a mere submission to authority and was not inextricably bound with unlawful conduct. (*Bumper v. North Carolina* (1968) 391 U.S. 543, 548; *People v. Johnson* (1968) 68 Cal.2d 629, 632.)

Here, Detective Velasquez asked Katherine for permission to conduct a search of her home after he and the other deputy sheriffs conducted a protective sweep of the residence. The evidence suggests that the officers were at all times courteous. Immediately after the protective sweep, Detective Velasquez spoke to Katherine on the porch. He explained why the officers were present and asked if defendant was on probation or parole. Katherine responded, "'Yeah. Something like that.'" Detective Velasquez told her that, "'being part of parole or probation, the residence is subject to search. His area is subject to search.'" "'Is it okay if we go in there and search for this weapon?'" Katherine responded, "'I don't have any guns. Go ahead and search.'" It was only after the rifle was retrieved that Katherine refused to sign the consent form tendered by Detective Velasquez.

There is nothing about the circumstances of this contact that suggests the consent by Katherine was involuntary or given as a result of any police over-reaching. Katherine felt sufficiently free to refuse to sign the consent document when it was offered to her a short time later by Detective Velasquez rather than being intimidated

into signing. We therefore conclude that Katherine's consent was freely and voluntarily given and that consent to search the house was free of any Fourth Amendment violation.

DISPOSITION

The trial court's order denying defendant's motion to suppress evidence and the judgment are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

I concur:

_____, Acting P. J.
DOI TODD

ASHMANN-GERST, J.—Dissenting

I respectfully dissent. With defendant secured outside his residence, there were no "articulable facts" suggesting any danger to the officers or others justifying a protective sweep of his residence. The unannounced, unlawful entry by six uniformed, armed officers was so temporally and spatially intertwined with Katherine Merritt's (Katherine) "consent" moments later, that the consent was the tainted fruit of that search.

The protective sweep

A warrantless search is presumptively unreasonable and hence illegal. (*People v. Celis* (2004) 33 Cal.4th 667, 676 (*Celis*); *People v. Haven* (1963) 59 Cal.2d 713, 717.) As the majority acknowledges, one exception to the warrant requirement is a limited "'protective sweep,'" articulated in *Maryland v. Buie* (1990) 494 U.S. 325, 327 (*Buie*), a case which approved a warrantless, limited search during an in-home arrest for the purpose of protecting the safety of police officers or others. (*Id.* at p. 335.) *Buie* only authorizes a sweep when there are "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept *harbors an individual posing a danger to those on the arrest scene.*" (*Id.* at p. 334, italics added.) A protective sweep in the close quarters of a residence, during an in-house arrest, is justified so that officers can "look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." (*Ibid*.)

Buie thus makes clear that a protective sweep is necessitated (1) by the unique dangers presented during an in-home arrest from clandestine, close-by hiding places in which danger can lurk, and (2) where there is reason to believe that there are *individuals* posing a danger to those at the arrest scene. Given the reasons for permitting a warrantless protective sweep, it is not surprising that ordinarily a residence is not subject to such a sweep when a defendant is apprehended outside. (See *Celis, supra,* 33 Cal.4th at pp. 678–679.) The danger in the outdoors, where there

are ordinarily fewer nooks and crannies behind which a person can hide and present a danger, is generally less than inside. Consequently, "[s]ome [appellate courts] have concluded, consistent with the facts presented in *Buie*, that a protective sweep must be 'incident to' a lawful arrest inside a house." (*Celis, supra,* 33 Cal.4th at p. 678 & cases cited therein.) Those allowing a protective search where the arrest occurs outside require the most exceptional circumstances. (See, i.e., *People v. Maier* (1991) 226 Cal.App.3d 1670, 1673–1674 [protective search of residence that uncovered murder weapon was justified where the defendant was a prison escapee and target of a New York task force for armed robberies, murder and attempted murder of a police officer, was ordered to come out with his hands up but disappeared from view for a few seconds before doing so, a sheriff's deputy had been told that "other suspects could be in the house," and the defendant habitually pursued his criminal activities with accomplices]; see also *People v. Mack* (1980) 27 Cal.3d 145 [entry into garage to search for additional suspects after five occupants of garage were ordered outside, justified where reasonable belief that some suspects had escaped and uncertainty that the five men who were ordered out were all the five persons accused of the burglaries]; see also *People v. Free* (1983) 94 Ill.2d 378, 397 [447 N.E.2d 218, 227] [protective sweep of house held proper in an out-of-house arrest where, "Although there was no evidence that the defendant had an accomplice in the commission of the crimes, one officer testified that he saw someone at both the front and back windows of the house before the defendant came out, and he could not be sure if both were the same person. . . ."])

As correctly pointed out by the majority, our Supreme Court in *Celis* did not limit the availability of a protective sweep to in-home arrests. But to state that *Celis* does not limit protective sweeps to in-home arrests does not answer the question of which outside arrests justify such searches. Nonetheless, the majority fails to probe or even refer to the facts and analysis of *Celis*, which rejected the lawfulness of the protective sweep before it. When properly analyzed, *Celis* leads to the inescapable conclusion that the protective search here was unlawful.

In *Celis* a drug task force, investigating a statewide drug trafficking ring suspected of concealing and transporting drugs inside large truck tires surveilled a house in San Diego. Because the defendant's car was parked outside of it, they traced its registration to defendant's house, which was also placed under surveillance. Over a two-day period, police followed defendant as he made several round trips from his home, with a deflated tire and an air pressurizing tank, to a tire store and to the Mexican border. When, on the second day, defendant left his house through a back door rolling a large, inflated truck tire into an alley with another man they had seen drive into the alley in a full-size pickup truck, the police detained both men at gun point. Then, "[b]ecause [police] had noticed that defendant's wife and 'possibly a male juvenile' lived with him, [police] *entered the house to determine if there was anyone inside who might endanger their safety.*" (*Celis, supra,* at pp. 671–672 italics added.) Inside, they did not find anyone but found a large box, containing uniformly sized, wrapped packages. Some 20 minutes later, the defendant consented to a search of the packages which were found to contain 16 kilograms of cocaine. (*Id.* at p. 672.)

Celis concluded that the warrantless search of the defendant's house could not be justified as a protective sweep. It reasoned that the officers had no knowledge of the presence of anyone inside at the time of the search because they "'had not been keeping track of who was in the house.'" (*Celis, supra,* 33 Cal.4th at p. 679.) They therefore entered without "'any information as to whether anyone was inside. . . .'" (*Ibid*.) The facts known to the officers before they performed the protective sweep did not meet the *Buie* requirement that the police have "'articulable facts' considered together with the rational inferences drawn from those facts, that would warrant a reasonably prudent officer to entertain a reasonable suspicion that the area to be swept harbors a person posing a danger to officer safety." (*Celis, supra,* at pp. 679–680.)

Here, the officers had even fewer "articulable facts" than in *Celis* that "the area to be swept [the inside of the residence] harbor[ed] a person posing a danger to officer safety." (*Celis, supra,* 33 Cal.4th at p. 680.) Defendant was apprehended at gunpoint outside of his residence, patted down and placed in the patrol car. The officers

identified the vehicle in which the rifle was last seen, parked outside of the residence. The record contains no evidence that the officers had any reason to believe defendant had an accomplice, that anyone was inside of his residence, or even that the rifle was inside. Unlike in *Celis*, the record here does not even indicate that they had any knowledge that defendant lived with anyone.[1]

While the officers had absolutely no evidence of any potential danger emanating from defendant's residence, the majority seeks to "find that danger . . . [in] the rifle's unknown location." (Maj. Opn., p. 7.) This fact alone is insufficient to constitute adequate justification for "a reasonably prudent officer to entertain a reasonable suspicion that the area to be swept harbors a person posing a danger to officer safety." (*Celis, supra,* 33 Cal.4th at p. 670.)

First, as the cases make clear, it is the danger from persons, not the existence of a weapon used in the offense, which justifies a protective sweep. Guns do not create a danger for officers, people with guns do. "Where an officer has no information about the presence of *dangerous individuals*, the courts have consistently refused to permit this lack of information to support a 'possibility' of peril justifying a sweep. [Citations.]" (*People v. Ledesma* (2003) 106 Cal.App.4th 857, 866, italics added.) "The mere presence of illegal drugs and weapons does not justify a protective sweep." (*U.S. v. Watson* (5th Cir. 2001) 273 F.3d 599, 603.) The record here contains no evidence that the deputies had any reason to believe that there were any individuals in the residence, as there was no evidence that anyone was seen inside, that defendant had an accomplice or that he lived with anyone.

Second, if, as the majority concludes, the use of an unaccounted for weapon used in the commission of an offense is sufficient to justify entry and protective sweep

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[1] It is also disturbing that the officers' intrusion into Katherine's residence was set in motion by an uncorroborated tip by Harry White (White), a previously unknown and untested, alleged-victim, informant, who appears to have had an undisclosed history with defendant. White knew where defendant lived and that he was home at the time that the police arrived.

of the home of a suspect apprehended outside, the narrow *Buie* exception to the warrant requirement would swallow the rule that searches without warrants are presumptively illegal. Virtually every offense wherein a weapon is used and the suspect apprehended outside would justify a protective sweep of the residence. This is neither good law nor good Fourth Amendment policy.

Furthermore, even assuming the correctness of the majority conclusion that an unaccounted for weapon justifies a protective sweep, it is hard to accept that proposition here where the officers entered defendant's residence without even bothering to first inspect the automobile just outside the residence in which the rifle was last seen.

Consent

Consent is a recognized exception to the Fourth Amendment proscription against warrantless searches. (*People v. Leib* (1976) 16 Cal.3d 869, 873; *People v. Superior Court* (*Walker*) (2006) 143 Cal.App.4th 1183, 1198.) Where the prosecutor relies on consent to search, the prosecutor has the burden of establishing that the consent was freely and voluntarily given, was not a mere submission to authority and was not inextricably bound with unlawful conduct. (*Bumper v. North Carolina* (1968) 391 U.S. 543, 548; *People v. Johnson* (1968) 68 Cal.2d 629, 632.)

The majority goes to great lengths to find evidentiary support for the trial court's finding that Katherine's "consent" was voluntary and justified the officers' reentry into defendant's residence and seizure of the rifle. It relies heavily on the fact that after the officers burst into defendant's residence uninvited, they were at all times courteous, which is quite beside the point. If the entry into the residence was an unlawful protective sweep, it is irrelevant that the officers were courteous after violating the law. The majority also points to Katherine's refusal to sign the consent to search form, after the search yielding the rifle was completed, as reflecting that she did not yield to any coercion when she gave consent. But it defies reality to conclude that the "consent" was voluntary when given after six armed and uniformed officers entered the residence unannounced and ordered, albeit nicely, everyone to leave. Also,

before receiving Katherine's "consent" to reenter her home to search, Detective Steven Velasquez told her that he could legally search even without her consent. He said that "being part of parole or probation, the residence is subject to search. His area is subject to search."

Nonetheless, for purposes of my analysis, I am willing to concede that Katherine's consent to search was voluntary. This matter does not turn on that fact, but rather on the fact that, whether or not voluntary, the consent was inextricably bound with, and the fruit of, the unlawful "protective sweep." (*Bumper v. North Carolina, supra,* 391 U.S. at p. 548; *People v. Johnson, supra,* 68 Cal.2d at p. 632.)

In *People v. Haven* (1963) 59 Cal.2d 713, 716–717 (*Haven*), an officer made an unlawful entry without probable cause or warrant into the defendant's residence. Inside, the officer searched the defendant and found a key to a hotel room, to which the defendant took him. There, the officer found marijuana that defendant admitted was his. Our Supreme Court rejected the officer's claim that his searches of the defendant's person and the hotel room were justified by the defendant's consent because the consent was vitiated by the prior unlawful entry. It stated: "A search and seizure made pursuant to consent secured immediately following an illegal entry or arrest . . . is inextricably bound up with the illegal conduct and cannot be segregated therefrom." (*Haven, supra,* at p. 719 [disapproving appellate court decisions containing contrary implications]; *People v. Johnson, supra,* 68 Cal.2d at p. 632; *U.S. v. Furrow* (9th Cir. 2000) 229 F.3d 805, 813–814 [the defendant's son's consent to search of their cabin tainted by prior illegal protective sweep of cabin, if son was aware of the illegal protective sweep], overruled on another point in *U.S. v. Johnson* (9th Cir. 2001) 256 F.3d 895.)

"When the accused claims a consent to search is tainted by a prior Fourth Amendment violation, mere voluntariness of the consent is not enough to dissipate the taint. [Citations.] In such cases, we must additionally examine 'attenuation' factors . . . to determine whether, on the particular facts, the twin purposes of the 'poisonous fruit' rule—to deter the exploitation of official misconduct and to promote

judicial integrity—are outweighed by the cost of excluding the challenged evidence." (*People v. Boyer* (2006) 38 Cal.4th 412, 450.) But the main consideration in a taint from prior illegal search is whether the consent given is "'sufficiently distinguishable to be purged of the primary taint.'" (*Wong Sun v. United States* (1963) 371 U.S 471, 488.) To purge the taint usually requires a showing of significant time, space or events between the illegal act and the consent. (*U.S. v. Furrow*, *supra*, 229 F.3d at pp. 813–814.) "'[T]he Government may not be heard to rely upon that consent alone to break the chain of causation between the illegality and further fruits.'" (*People v. Baker* (1986) 187 Cal.App.3d 562, 568.)

Here, Detective Velasquez asked Katherine for permission to conduct a full search of her home moments after he and five other uniformed and armed officers entered her home unannounced, ordered her and her family onto the porch outside and then conducted an unlawful "protective search." While the evidence suggests that the officers were courteous, their manner of entry must have been frightening to the residents, and their "protective search" must have suggested to the residents that the officers had the right to enter and search as they pleased, regardless of whether they received consent to do so. Immediately after the "protective search," Detective Velasquez spoke to Katherine on the porch, out of earshot of other family members. He explained why the officers were present and asked if defendant was on probation or parole. Katherine responded, "'Yeah. Something like that.'" Detective Velasquez told her that, "'being part of parole or probation, the residence is subject to search. His area is subject to search.'" "'Is it okay if we go in there and search for this weapon?'" Katherine responded, "'I don't have any guns. Go ahead and search.'" She was not given any time to confer with family members or anyone else before responding. Katherine denied ever consenting to any search.

Further, Detective Velasquez's assertion of authority to search by reason of defendant being on probation or parole was inaccurate. Defendant was not on probation or parole. This misinformation, although based upon Katherine's statement that defendant was on "something" like parole or probation, reinforced the perception

created by the illegal protective search that the officers were entitled to enter and search her home no matter what she said. This further tied her "consent" to the unlawful protective sweep.

Given these circumstances, I cannot say that Katherine's apparent consent was independent of, and not inextricably bound up with, the illegal "protective search." There was virtually no gap in time, place or events to purge the consent of the taint.

_____, J.
ASHMANN-GERST